88-642

RECORD NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

J. CARL POINDEXTER and
JOSEPHINE T. POINDEXTER
Petitioners

v.

TOWN OF ROCKY MOUNT,
ALLEN O. WOODY, JR.,
DAVID A. FURROW,
DAVID A. MELESCO,
and
WILLIAM J. WALKER, JR.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, J. CARL POINDEXTER and JOSEPHINE T. POINDEXTER, petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit as follows:

1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Does the levy on a motor vehicle by a state deputy sheriff on a writ from a state court in violation of a federal statute for the purpose of enforcing a federal judgment constitute a denial of due process of law for which there is relief under 42 U.S.C. § 1983?

(2) Is an illegal levy on a speech-purveying vehicle a deprivation of the right of free speech for which there is relief under § 42. U.S.C. § 1983?

(3) Do the imposition of attorneys' fees under 42 U.S.C. § 1988 and sanctions under Rule 11 of the Federal Rules of Civil Procedure on unsuccessful claimants suing under 42 U.S.C. § 1983 constitute: (i) a denial of due process of law when there was no hearing or evidence taken; (ii) a denial of right of trial by jury under the facts of this case; and (iii) a denial of the constitutional right to petition government for grievances.

11. NAMES OF PARTIES

The namesof all parties are listed in the caption. The respective counsel is stated in the proof of filing and services at page 32 et seq.

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1V. REFERENCE TO REPORTS AND OPINIONS

By judgment on July 15, 1988, the United States Court of Appeals for the Fourth Circuit denied a petition for rehearing of a decision on July 9, 1988 affirming summary judgments of the United States District Court for the Western District of Virginia on September 22, 1987 (concerning the merits) and November 17, 1987 (concerning sanctions and attorneys' fees). The decision of the Fourth Circuit on June 9, 1988 was unpublished but is included in the appendix of this petition.

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

The Petitioners are parties in a case in, and are aggrieved by a decision of, the United States Court of Appeals for the Fourth Circuit sustaining a judgment denying them a civil rights claim for which relief is provided by 42 U.S.C. § 1983 and upholding sanctions and attorneys'

fees awarded against them under Rule 11 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988; and

(1) The judgment sought to be reviewed was made and entered by the United States Court of Appeals for the Fourth Circuit on June 9, 1988 resulting in an unpublished decision which is included in the appendix of this petition; and

(2) By order on July 15, 1988 said United States Court of Appeals for the Fourth Circuit denied a petition for rehearing and this order is the final judgment of such appellant court; and

(3) The statutory provision believed to confer jurisdiction on this Court to review said final judgment on July 15, 1988 by writ of certiorari is 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions are listed as

follows; but because they are lengthy, the pertinent texts are set forth in the appendix:

1. Constitution of the United States
   Amendment 1
   Amendment V11
   Amendment V111
   Amendment X1V, Section 1

2. United States Code
   42 U.S.C. § 1983
   42 U.S.C. § 1988

3. Federal Rules of Civil Procedure
   Rule 11
   Rule 69(a)

4. Code of Virginia of 1950 as amended
   Va. Code § 8.01-447
   Va. Code § 8.01-466

V11. STATEMENT OF THE CASE

The Petitioners who are husband and wife are jointly referred to as "Poindexters"; the husband is referred to as "Dr. Poindexter"; the wife is referred to as "Mrs. Poindexter";

the five Respondents are jointly referred to as "defendants" and individually referred to as "Town", "Woody", "Furrow", "Melesco" and "Walker", respectively; the United States Court of Appeals for the Fourth Circuit is referred to as the "court of appeals"; and the United States District Court for the Western District of Virginia is referred to as the "trial court".

(A) PROCEDURE IN CASE

On December 3, 1985 and acting pro se, Dr. Poindexter filed a complaint in the trial court pursuant to 42 U.S.C. § 1983 (also citing other code sections) asserting a levy on an automobile owned jointly by Mrs. Poindexter and himself lacked due process of law and violated his right of free speech. Each of the defendants separately filed a motion to dismiss tantamount to a common law demurrer. Acting pro se, Mrs. Poindexter

filed a motion on February 4, 1986 requesting she be a co-plaintiff with Dr. Poindexter. By order on June 3, 1986, the trial court granted the motions to dismiss. This order was accompanied by a memorandum opinion dealing with the due process issue and is included in the appendix.

After the dismissal, Dr. Poindexter acting pro se filed a petition for rehearing on June 12, 1986 pointing out the opinion by the trial court on June 3, 1986 only discussed the due process issue and not the free speech issue. Mrs. Poindexter filed a similar petition. Accordingly by order on June 7, 1986, the trial court vacated the order on June 3, 1986 insofar as it purported to be a final order on the free speech claim but affirmed it as a final order on the due process claim. Mrs. Poindexter then made a motion to become a

party because she had not yet been recognized as a party at the time of the decision on the due process issue. Thus by order on July 1, 1986, the trial court made Mrs. Poindexter a party but overruled her motion insofar as it pertained to the due process issue. Consequently the due process issue continued to be disposed of on the motions to dismiss tantamount to demurrers pursuant to the memorandum opinion dated June 3, 1986.

Respective motions for summary judgment with attached affidavits or motions to dismiss treated as motions for summary judgment were filed by the respective defendants and counter-affidavits were filed by Dr. and Mrs. Poindexter. By order on October 31, 1986 accompanied by a memorandum opinion included in the appendix of this petition, the free speech claim was dismissed as

to the defendants, Furrow and Town. Because there was a question as to whether this would be considered a final judgment as to these two defendants and could not be timely appealed if the Poindexters waited until the litigation was completed against the remaining three defendants, an appeal was undertaken and by order of the court of appeals on April 23, 1987, the appeal was dismissed on the grounds it was premature. Even though the court of appeals declined to award attorney fees and recognized the meritorious nature of and need for the appeal, the trial court on July 30, 1987 labeled the appeal frivolous and directed the Poindexters file any opposition to the motions for summary judgment within twenty days. After that was done, the trial court by order on September 22, 1987 granted summary

judgment to Woody, Furrow and Walker. A memorandum opinion was attached and is included in this appendix. Without a hearing on whether the claims of the Poindexters were frivolous, the trial court directed the defendants file petitions for attorneys' fees and this was done. Dr. and Mrs. Poindexter filed counter petitions. By order on November 17, 1987, the trial court awarded attorneys' fees totaling $11,202.07. A memorandum opinion was attached and is included in the appendix. The fees included the time on the interim appeal.

After the trial court had dismissed the due process claim but had not dismissed the free speech claim, Dr. Poindexter and W. H. Houseman filed a petition for relief for an award against them in favor of the Town and Board of Supervisors of Franklin County for attorneys' fees in a different case. Because a final judgment had been

rendered for same, the trial court on September 22, 1986 dismissed the petition before the defendants had an opportunity to respond and sanctioned Dr. Poindexter $5,000.00. Mr. Houseman was not sanctioned. In the first appeal to the court of appeals, Dr. Poindexter also appealed this sanction but the court of appeals held the appeal was premature. Because the final order awarding attorneys' fees was after the appeal of the final order on September 22, 1987, the appeal of the award of attorneys' fees and sanctions was a separate record but was consolidated in the court of appeals for the brief and decision.

There was never a face-to-face appearance between the trial judge and a lawyer or litigant. By way of summary, the due process claim of the Poindexters was dismissed by defensive pleadings in the nature of a demurrer pursuant to the rationale in a memorandum opinion dated

June 3, 1986 appearing on page A-13 of the appendix to this petition . The free speech claim was dismissed as to Melesco and Town by summary judgment accompanied by a memorandum opinion dated October 31, 1986 included in the appendix at page A-18. The free speech claim was dismissed as to Woody, Furrow and Walker by summary judgment accompanied by a memorandum opinion dated September 22, 1987 included in the appendix on page A-26. The attorneys' fees were awarded by order on November 17, 1987 accompanied by a memorandum opinion included in the appendix on page A-38. The court of appeals discusses the due process issue and the free speech issue in part one of its opinion and the award of attorneys' fees and sanctions in part two of its opinion.

(B) FACTS OF THIS CASE

The genesis of this controversy was a utility tax enacted by the Board of

Supervisors of Franklin County which by state law exempted the citizens of the Town within said county even though they are also citizens of the county and pay other county taxes. The tax revenue was used for the school system which educated children of the Town as well as the surrounding county. Believing the tax discriminatory, Dr. Poindexter, a retired professor of economics and government, and sixteen other citizens jointly filed a petition in the trial court challenging the tax. The suit was dismissed and attorneys' fees were awarded against the plaintiffs on the grounds the suit was frivolous, This dismissal and attorneys' fees were upheld by the court of appeals and certiorari was denied by this Court.

Even though the judgment of the federal court in favor of the Town against Dr. Poindexter and others was valid, Dr. Poindexter and the others believed they

had a political right to protest against both the utility tax and the collection of attorneys' fees from them. A political rally was scheduled and Dr. Poindexter placed on his stationwagon, owned jointly with Mrs. Poindexter, various signs proclaiming the officials of the Town were inadequate leaders. In his complaint in this action, he asserted these officials were acting vindictively towards him to "teach him a lesson" because he dared to oppose them. As he drove his vehicle in the Town to attend the political meeting, the vehicle was stopped by a deputy sheriff under a writ of fieri facias issued by Walker as clerk of the Circuit Court of Franklin County to enforce the federal judgment in favor of the Town against Dr. Poindexter and the other citizens for the attorneys' fees. The deputy stated that Furrow, the attorney acting for the Town, would post a bond and accordingly the deputy not only levied but started to

seize the vehicle. During the course of the discussion, Woody, the mayor of the Town, and Melesco, the then current attorney for the Town, appeared. To avoid seizure of the vehicle levied upon, Dr. Poindexter wrote a check on his bank account which had sufficient funds to pay the judgment. This paid the judgment on behalf of all seventeen defendants and not just on the pro rata share of Dr. Poindexter.

Furrow, as an attorney for the Town, obtained the writ of fieri facias (the levy) from a deputy of the clerk, Walker, rather than from Walker himself, but only Walker's name appeared on the writ.

By the present action now being appealed, Poindexter contends that since the writ of fieri facias could not be issued for a federal judgment by a clerk or deputy clerk of a state court, the

levy on the vehicle was without due process of law and was done for the purpose of suppressing the use of the signs on the vehicle in violation of the right of free speech of both Dr. and Mrs. Poindexter. Their claims are made in good faith and are not frivolous.

V111. ARGUMENT

POINT 1 - THE LEVY ON THE MOTOR VEHICLE BY A WRIT OF FIERI FACIAS ISSUED BY THE STATE COURT ON A FEDERAL JUDGMENT WAS A DENIAL OF DUE PROCESS OF LAW FOR WHICH THERE IS RELIEF UNDER 42 U.S.C. § 1983.

Furrow obtained an abstract of the federal judgment from the clerk of the federal court and then took it to the courthouse in Rocky Mount, Virginia, to record as a judgment lien. According to his affidavit, he saw Poindexter in his speech-purveying vehicle and decided to levy on it. Consequently he had a deputy clerk of the Circuit Court of Franklin County issue a writ of fieri facias on the federal judgment, place it in the hands of a

deputy sheriff who then stopped the car and handed Poindexter the writ thereby making a levy. The deputy sheriff was obligated under Virginia law to execute the Virginia writ. However, Va. Code § 8.01-466 only permits the issuance of a writ of fieri facias [levy] by the clerk of the court in which the judgment was rendered. The clerk can not issue a writ of fieri facias for a judgment rendered by another court within the state or for a judgment of another state or for a federal court. Even though the federal judgment may be recorded (docketed) and became a lien on real estate in the same manner as a state judgment is lien pursuant to Va. Code § 8.01-447, enforcement of the federal judgment must be by writ of execution pursuant to Rule 69 of the Federal Rules of Civil Procedure. In other words, the writ should have been issued by the

federal clerk instead of the state clerk and consequently the process obtained by the defendants and used by the deputy sheriff against Dr. Poindexter was completely illegal and without foundation. Mrs. Poindexter was also aggrieved because she jointly owned the vehicle and agreed with its speech-purveying purposes.

In its memorandum opinion dated June 3, 1986, the trial court agreed the levy on the vehicle was illegal and the defendants had acted under color of state authority to illegally seize the vehicle. The trial court ruled, however, such conduct did not assume a constitutionally significant deprivation of rights citing *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Daniels v. Williams*, 474 U.S. (1986). Significantly the trial court held Dr. Poindexter (Mrs. Poindexter was not yet a party) could challenge the

unauthorized procedure under Va. Code § 8.01-195.1 et seq (Virginia Tort Claims Act).

In *Parratt v. Taylor, supra,* a prisoner ordered by mail $23.00 worth of hobby materials which were lost by the jailers. Because normal procedures for handling the mail were not followed, he asserted the negligence violated a right protected by 42 U.S.C. § 1983. This Court held the "person" and "color of law" elements were established but the "deprivation" by ordinary negligence was not without due process of law. One factor was the availability of a state remedy for such negligence. In *Daniels v. Williams, supra,* an inmate slipped on a pillow negligently left on a stairway of a jail. This Court held due process is not implicated by an unintentional act so as to "deprive" a person of life, liberty or property without due process of law. A concurring opinion

notes such negligent act would be a deprivation if there were no adequate state remedy for the negligence.

The trial court was clearly erroneous. Va. Code § 8.01-193.3 indicates Virginia is liable for claims for money on account of damages lost on property or personal injury or death caused by the negligence or wrongful act or omission of a state employee while acting in the scope of employment under circumstances where Virginia, if a private person, would be liable to the claimant for such damages, loss, injury or death. There are exceptions and the sixth is "... any claim arising out of the institution or prosecution of any judicial or other administrative proceeding, even without probable cause". Obviously this eliminates a claim by Poindexter under that state statute.

The court of appeals also held Poindexters did not have a claim under

42 U.S.C. § 1983 because there were various state law remedies. Even if there were some possible remedies by Poindexters against the defendants in state courts which could not be defeated by the doctrine of sovereign immunity, he was "fighting city hall" and needed the protection of the federal forum. *Monroe v. Pape*, 365 U.S. 167 (1961) holds a claim is made under 42 U.S.C. § 1983 when unconstitutional actions are taken without state authority as well as to unconstitutional actions authorized by the state. In effect, there is no abstention in civil rights cases. Previously the rule was that if the official of the state violated state law, then the action should be taken in a state court; but when the state law itself violated federal law and a state official was acting in accordance with state law, then the action would be in federal court. Now if a federal constitutional right

is violated by the state official acting under color of state authority, 42 U.S.C. § 1983 applies. While *Monroe v. Pape, supra*, held a municipal corporation was not a "person" under 42 U.S.C. § 1983, this was reversed in *Monell v. New York City, etc.*, 436 U.S. 658 (1978). Thus the Town is liable with the other defendants.

In *Monroe v. Pape, supra*, where the police officers had acted illegally in violation of both federal and state laws, the defense was that since the state prohibited such conduct, the claimants had adequate remedy under state law. After reviewing the history of 42 U.S.C. § 1983, this Court held:

> "Although the legislation was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to Illinois as it is to the State whose names are mentioned over and over again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary

> to the state remedy, and the latter use need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitutional and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." 365 U.S. at page 183.

In *Lynch v. Household Finance Corporation,* 405 U.S. 538 (1972), this Court held that 42 U.S.C. § 1983 applies to the deprivation of property rights as well as deprivation of personal rights even though this Court had previously held the statute only applies to deprivation of personal rights. In that case, a Connecticut resident, whose savings account was garnished under a Connecticut law authorizing summary pre-judicial garnishment at the request of the alleged creditor's attorney, brought a class action in the United States District Court for the District of Connecticut to enjoin enforcement of the statute in violation of the Fourteenth Amendment. A three judge District Court dismissed the

complaint for lack of jurisdiction under 28 U.S.C. § 1343(3) because the injunctive relief was barred by 28 U.S.C. § 2283. On direct appeal, this Court reversed holding the suit was within federal district court jurisdiction, whether it involved personal rights or only property rights, under 28 U.S.C. § 1343(c) which created federal district court jurisdiction of suits to redress deprivation under color of state law of any right secured by the constitution or any federal statutes involving equal rights of citizens or all persons within the jurisdiction of the United States; and (ii) the prohibition of 28 U.S.C. § 2283 against a federal court staying state court proceedings was not applicable because the garnishment was levied and maintained without the participation of the Connecticut courts. This case controls the case at bar. There state court process violated federal standards of due process because of the lack of notice. Here state

court process violated federal standards because there was no underlying state judgment on which to make a levy. A state agency was using an invalid writ issued by a state official to enforce a valid federal judgment; and certainly it is within the purview of federal courts to protect the dignity of its own processes.

The distinction between *Monroe v. Pape, supra,* and *Parratt v. Taylor, supra,* is rather simple. When a person under color of state authority is merely negligent while performing his duties, there is no "deprivation" of a civil right. For example, if a police officer were driving an automobile and, without an emergency, carelessly drove past a red light signal and damaged an automobile of a claimant, the claimant's remedy is an ordinary tort action for the negligence against the policeman and possibly his employer. On the other hand, when a person under color of state authority

is oppressing a federally protected right, there is a "deprivation" of a civil right. For example, if a police officer searches a house and seizes property on a fake process not issued by a magistrate under federal or state law, the remedy is for a deprivation of a civil right even though there may be a parallel remedy for violating state law. Here there was no technical violation of rules of state agencies involving state regulations, but a substantive lack of due process of law by their being no process. The correct rule in this case is stated in *Parratt v. Taylor, supra,* which cited with approval *Monroe v. Pape, supra,* as follows:

> "[I]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of

> rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." 451 U.S. at pages 534 and 535.

Although not argued by the defendants, the court of appeals also held there was no claim by Poindexters because the writ of fieri facias was never executed. The affidavit of Furrow states the levy was executed by the deputy sheriff stopping the vehicle and handing the writ to Poindexter. The court of appeals was confused between a levy and a seizure. In *Dorrier v. Masters*, 83 Va. 459, 2 S.E. 927 (1887), the Supreme Court of Virginia held:

> "To constitute an effectual levy it is not essential that the officer should make an actual seizure; if he has the goods in his power and view, this may suffice; and where certain slaves were in the *presence* of the officer, and on which he declared that he levied the execution, and thereupon took a list of them, but did not touch them, and went away without removing them from the debtor's custody on his engaging to produce them on the day of the sale; this

> was, nevertheless, deemed a good levy". 83 Va. at page 476.

Unfortunately appropriate authority was not presented to the court of appeals because this portion of this decision was unexpected, made without suggestion or argument, but obviously erroneous.

Obviously the use of the writ illegally issued under state authority by state officials to enforce a federal judgment was a deprivation of due process of law involving the property rights of Poindexters for which they are entitled to relief under 42 U.S.C. § 1983.

POINT 2 - THE LEVY OF THE MOTOR VEHICLE WAS A DEPRIVATION OF THE FREE SPEECH OF POINDEXTERS WHICH THERE IS RELIEF UNDER 42 U.S.C. § 1983.

At the time of the levy, Dr. Poindexter was driving a vehicle jointly owned with Mrs. Poindexter containing signs derrogatory of the officials of the Town. He was headed to a political rally critizing the Town. Obviously the Town,

Mayor Woody, Attorney Melesco and Attorney Furrow were unhappy with these signs of Poindexters attached to their motor vehicle. It is significant that Dr. Poindexter had in the bank sufficient funds to pay the federal judgment and an appropriate writ of execution could have taken these funds without a levy on the speech-purveying vehicle. Yet instead of following correct procedures to collect the judgment and singling Dr. Poindexter out without regard to the other sixteen judgment debtors, Furrow caused the illegal levy to be issued by a deputy clerk in the name of the clerk, Walker, and stopped this speech-purveying vehicle of Poindexters. At that point, both Melesco and Woody appeared. Poindexter indicated in his counter-affidavit that the officials of the Town said they were going to teach him a lesson for questioning their decision. Under such circumstances, a jury might conclude the

Town, Poindexter, Melesco and Furrow were levying on his speech-purveying vehicle to remove the signs rather than to collect the judgment. Of course, there was no jury trial on which to base findings of fact.

Amendment 1 of the Constitution of the United States guarantees free speech. In *Perry v. Snidermann*, 408 U.S. 593 (1972), this Court held the discharge of a nontenured college teacher because of his exercise of his right of free speech violated his constitutional right of free speech. Thus this Court held he had a claim under 42 U.S.C. § 1983 notwithstanding the lack of tenure. On remand, the majority held he needed to prove lack of due process and the minority held he was entitled to summary judgment. Either way the trial court and court of appeals erred in this case. Poindexters had a speech-purveying vehicle taken from them. It was taken illegally.

They were illegally denied their right of free speech. This denial was by the Town and its agents. 42 U.S.C. § 1983, unlike its criminal counterpart in 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. *Parratt v. Taylor, supra,* at page 534.

Neither the trial court nor the court of appeals held an illegal levy to remove the speech-purveying vehicle would not be a deprivation against the right of free speech guaranteed by Amendment 1 of the Constitution of the United States for which there would be relief under 42 U.S.C. § 1983. Instead the court of appeals merely held there was no evidence the purpose of the levy was to remove the speech-purveying vehicle holding Poindexters' claim to be speculative. The trial judge went further holding "the evidence in this case shows without dispute that the purpose of the defendants

was to collect a judgment and not to interfere with the free speech rights of either one of the plaintiffs". The answer to this is there was no trial or even a hearing for the judge to have evidence.

The decision of the trial judge on October 31, 1986 holding for Melesco and the Town stated the pleading only mentioned them as "defendants" without alleging personal acts by them. Even though *Monell v. New York City, etc., supra,* holds a municipal corporation is a "person" within the meaning of 42 U.S.C. § 1983, the municipal corporation is still not liable unless the deprivation was pursuant to a governmental "custom, even though such custom does not receive formal approval". If the function of the Town in levying on the speech-purveying vehicle was to teach Poindexter a lesson and make an example of him to others who would oppose Town policies, that would

certainly be a sufficient illegal custom to constitute a deprivation. When an official has final authority in a matter involving selection or goals, his choice is to represent policy. *Wellington v. Daniel*, 717 F.2d 932, 936 (4th Cir. 1983). Obviously if the Mayor and attorney Melesco were going to teach Dr. Poindexter a lesson, the Town is liable as well as them.

In its memorandum opinion on September 22, 1987, the trial court granted summary judgment to the remaining three defendants, Woody, Furrow and Walker. The holding for Furrow was based on the fact that even though he apparently acted mistakenly when obtaining the levy from the state court clerk instead of the federal court clerk, his motive was not to deny Poindexter free speech but to collect a judgment. A similar rationale held for Woody. The rationale dismissing Walker was that he

Through Error Page 38 Does Not Exist

did not issue the bogus writ which was issued by a deputy and the doctrine of respondeat superior does not apply in cases under 42 U.S.C. § 1983. *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977). Of course, this Court has not decided such issue. In fact, in *Monell v. New York City, etc., supra*, this Court held a town could be liable; and obviously a town must act by an agent. Even if the clerk could not be liable for a civil rights violation by a deputy, there is no evidence that Walker did not customarily permit deputies to issue writs of fieri facias on federal judgments. Also the copy of the writ handed to Dr. Poindexter by the deputy sheriff only contained the name of Walker.

Obviously the levy violated Poindexters' constitutional guaranty of free speech and they make claim against the defendants under 42 U.S.C. § 1983. Any

factual reason for dismissal of a particular defendant should await the further development of the evidence. Here, each defendant merely filed a motion for summary judgment accompanied by a self-serving affidavit and there were counter-affidavits by Dr. and Mrs. Poindexter respectively. A holding by agreeing with the self-serving affidavits that the defendants did not intend to interfere with the speech-purveying vehicle but only wanted to collect the judgment is probably wrong factually; and to label Poindexters claim as speculative without seeing them, meeting them or hearing testimony for or against them is inappropriate.

POINT 3 - ATTORNEY'S FEES AND SANCTIONS WERE IMPROPERLY IMPOSED

This point is sub-divided into four sections.

A

THE AWARDS WERE WITHOUT MERIT

There was no evidentiary hearing.

Yet the trial court in its decision on November 17, 1987 held "this Court must conclude that the entire proceeding in this case was vindictive, frivolous and vicious and was brought by spite held [by Poindexter] against the defendants". Poindexters did not obtain from the clerk of the state court a writ in violation of Va. Code § 8.01-466. Poindexters did not take any property from the defendants by a bogus process. Poindexters did not interfere with the defendants' right of free speech. They proceeded to settle their grievances by lawful process through the courts. The defendants obtained the writ unlawfully. Even if they did not intend to levy on the vehicle illegally or to interfere with the right of free speech by Poindexter, they nevertheless levied by wrongful process. Certainly without evidence, a trial court should not have made such a finding.

Sometimes when a claimant files a civil action against another, he may not be personally enamoured with the other and may even have ill will towards the other person. Nevertheless the policy of the law is for the claimant to settle his dispute in the courtroom and not on the street corner. If Dr. Poindexter was going to a political rally in a motor vehicle with political signs on it and his political opponents attempted to take his speech-purveying vehicle from him under the disguise of levying on a legitimate judgment,he may not particularly love his opponents; but his civil action hereby involved is based on the fact that the legitimate judgment was being enforced by illegitimate means. Consequently the case is not vindictive or frivolous or vicious in the legal sense. [For example, if one person stabbed another unlawfully and the wounded person sued his assailant, he may not love

his assailant but wish him ill will; but his spite would not mean he brought his claim wrongfully from a legal point of view.]

The test of whether the suit was frivolously brought is not whether Poindexters won or lost but whether the claim is colorable and of arguable merit. *Vaughan v. Pulito*, 804 F.2d 873 (5th Cir. 1986). When a sheriff levies on a speech-purveying vehicle on a warrant issued by a state official in violation of the state law, the claim is obviously colorable and of arguable merit. In fact, Poindexters asserts the trial court and the court of appeals erred in dismissing this suit and seeks correction of this injustice by this petition for writ of certiorari. Even if this Court should agree with the courts below, Poindexters were still acting honorably by asserting the claim of colorable and arguable merit by judicial proceeding.

The loss of the litigation should not be accompanied by sanctions and attorneys' fees.

Furthermore the size of the awards of attorneys' fees is more than the average litigant can save during the course of years. The amount is disproportionate to any needed sanction. Furthermore the trial court exceeded its authority by awarding attorneys' fees for time spent on the interim "frivolous appeal" which can only be done by the court of appeals. *Sierra Club v. Corp of Engineers*, 776 F.2d 383 (1985) at page 392.

Clearly the trial court abused its discretion, not only in making the awards, but in the size of the awards of sanctions and attorneys' fees.

B

THE AWARDS REQUIRED TRIAL BY JURY

Courts of law historically may award costs to the prevailing party. However, neither courts of law nor courts of equity

may historically include attorneys' fees as part of the costs. In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), counsel fees had been awarded by the trial court based upon its equitable powers and the theory the claimants were entitled to fees because they were performing the services of a "private attorney general". This Court held under the American rule, attorneys' fees were not part of the costs and it was inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation. This case followed a long line of decisions originating with *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.Ed 613 (1796) which involved an appeal in a suit in equity where a decree of a federal court of the District of Rhode Island was affirmed. It appeared damages included a charge of $1,600.00 for counsel fees in the courts below and this was disallowed.

The Attorney's Fees Award Act of 1976

changed the rule that counsel fees are not costs by amending 42 U.S.C. § 1988 to permit the prevailing party in a civil rights case to collect counsel fees as part of the costs. There would be less problem if the statute were interpreted to award a prevailing party standard counsel fees as part of the costs. However, the statute is construed to treat plaintiffs and defendants differently. The prevailing plaintiffs win large fee awards unless special circumstances would render such awards unjust; but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is frivolous, unreasonable or groundless. *Roadway Express v. Piper*, 447 U.S. 752, 762 (1980). In effect, 42 U.S.C. § 1988 has created a new tort against the unsuccessful plaintiff or his lawyer for frivolous litigation very similar to malicious prosecution or abuse of process.

To be awarded damages for malicious

prosecution at common law, the plaintiff must allege and prove that: (i) the prosecution was commenced by the defendant; (ii) it terminated in a manner not unfavorable to the plaintiff; (iii) it was without probable cause; and it was malicious. However such actions only lie for instituting criminal cases and not for sanctioning civil cases unless there has been an arrest of the plaintiff or seizure of his property or some type of special injury to him. *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E. 2d 108 (1980).[1]

Abuse of process applies to both civil and criminal cases. Elements are an

---

[1]This decision not only held a physician who was allegedly sued frivolously for malpractice can not maintain an action against the lawyer for the claimant because there had been no arrest or seizure of his property but also held there was no special injury to him. Finally it held he was not entitled to legal fees from opposing counsel because the duty of counsel was to the opposing party and not to the physician.

ulterior motive when properly obtaining a valid process and an act in the use of a process not proper in the regular prosecution of the proceeding. *Glidewell v. Murray-Lacy*, 124 Va. 563, 98 S.E. 665 (1919). Apparently malicious prosecution and abuse of process are mutually exclusive because if the process was maliciously undertaken, it would be improper in the beginning; but where the process is otherwise appropriate and does not give rise to an action for malicious prosecution, but is nevertheless used for a purpose not intended as a "whip to force the payment of an alleged indebtedness" or similar misuse, the action lies. *Mullins v. Sanders*, 189 Va. 624, 623, 54 S.E. 2d 116, 121 (1949).

42 U.S.C. § 1983 makes a change in the common law to where the attorney who filed a frivolous suit against the physician would now be liable (if it were a civil rights case). In common law actions already in existence. Amendment V11 of the Constitution

of the United States of America provides that:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved...."

This court has stated that the constitutional right of trial by jury in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence. *Hodges v. Eastern*, 106 U.S. 408 (1982); and must be guarded with jealousy. *Blaylis v. Travelers Insurance Company*, 113 U.S. 316 (1985). In the early case of *Parsons v. Bedford*, 28 U.S. 433 (1830), this Court, in an opinion by Mr. Justice Story, held that the phrase "common law" found in the Seventh Amendment, preserving the right of trial by jury in suits at common law, is used in contradistinction to suits in equity or admirality; and it is well known in civil cases in courts of equity and admirality, juries do not intervene. This Court concluded the reference the Seventh

Amendment to the "common law" did not merely mean suits which the common law recognized among its old and settled proceedings, but also suits in which the legal rights were ascertained and determined in contradistinction from those where equitable rights alone were recognized and equitable remedies were administered. This Court further stated that in a just sense, the Seventh Amendment may well be construed to embrace all suits which are not of equity or admirality jurisdiction, whatever may be the particular form which they may assume to settle legal rights. In *Curtis v. Loether*, 415 U.S. 189 (1974), this Court quoted extensively from Mr. Justice Story's opinion in *Parsons v. Bedford, supra*, again in *Pennell v. Southhall Realty*, 416 U.S. 363 (1974), this Court quoted its prior decisions specifically reiterating that trial by jury not only applies to suits at common law as the same existed at the time

of the adoption of the constitution, but also applies to suits where the rights and remedies are traditionally enforced by actions at law rather than causes in equity or admirality, even though the precise action was unknown at common law. Obviously an award of attorneys' fees as damages for filing a frivolous suit even though under the guise of costs is an award for damages in an action not precisely known at common law but very similar to awards at common law for malicious prosecution and abuse of process.

In *Clements v. Macheboeuf*, 92 U.S. 418 (1876), this Court held in the opening paragraph:

> "Equity exercises jurisdiction in cases of accident, mistake or fraud, where the party has not a plain, adequate and complete remedy at law. Where the remedy at law is plain, equity will not interfere if the remedy is also adequate and complete..." 92 U.S. at page 18.

Attorneys' fees awards are for money only

and thus the remedy at law is adequate and complete.

Obviously Congress may provide that successful litigant in civil rights cases may recover attorneys' fees as costs and fix a schedule for attorneys' fees similar to a schedule for costs. However, when the award in favor of a defendant against a plaintiff is conditioned on the plaintiff having filed a frivolous suit, the award is based on a common law tort for money damages and the unsuccessful plaintiff is entitled to right of trial by jury.

C

THE AWARDS LACK DUE PROCESS OF LAW BASED ON INHERENT AUTHORITY OF THE TRIAL COURT

Obviously courts of law, equity and admiralty have the inherent power to discipline lawyers and litigants and require they follow the rules of litigation. Usually the penalty against a lawyer or litigant for failing to

follow the rules is an adverse judgment against his case. *Link v. Wabash R. Company*, 370 U.S. 626 (1962). Since assessment of counsel fees is usually a less severe sanction than outright dismissal, apparently it is appropriate to award minor sanctions as an inherent power to make litigants and lawyers comply with the rules. See *Roadway Express v. Piper, supra.* In *Newman v. Piggy Park*, 390 U.S. 400 (1968), a civil rights claimant had been successful and sought and was awarded counsel fees as authorized by Congress. On appeal, the Fourth Circuit held the claimant should only be awarded excess fees and costs caused by bad faith of opposing party. This Court reversed and in footnote 4 held that if Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for the purpose of delay, no new statutory

provision would have been necessary because the trial court had the inherent authority to sanction for bad faith.

This bad faith exception to the American rule against the award of attorneys' fees is recognized in the Court's subsequent decisions including *Alyeska Pipeline Company v. Wilderness Society, supra.* In *Roadway Express v. Piper, supra,* where the inherent authority to sanction is dealt with separately from statutory provisions, the Court concludes like all other sanctions, attorneys' fees should not be assessed lightly or without fair notice and opportunity for a hearing on the record.[2] Where contemptuous conduct is not in open court requiring immediate punishment,

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[2]See dissent of Mr. Justice Stewart where he stated "although a trial court has certain inherent contempt powers, I have the gravest doubts about its inherent power to order a lawyer [or litigant] to pay damages to an opposing litigant. 447 U.S. at page 771 [bracket insertion added].

procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have the chance to testify or call witnesses in his behalf, either by way of defense or explanation." *Re: Green* 369 U.S. 869 (1962) at pages 691 and 692. Here there was no such process by the trial court.

If sanctions and attorneys' fees were to compensate the successful litigant for having to defend a frivolous suit, they are damages for tortious conduct and a jury trial is required. If they are imposed under the inherent power of the trial court to protect it from wasting time on unfounded litigation, they are penal awards. See *Trop v. Dulles*, 356 U.S. 86 (1958). As such, they violate the excessive fines clause of Amendment V111 of the Constitution unless the "punishment fits the offense". Without

evidence, the trial court could not determine the culpability of Dr. Poindexter and what, if anything, was needed to deter him and others in the future. Dr. Poindexter as a retired college professor, may have to sell his house to pay the punitive award or he may be so rich he will never miss it. The only evidence was bloated time sheets of lawyers supported by affidavits but not subject to cross-examination.

Clearly the imposition of sanctions and awards of attorneys' fees violated constitutional rights to procedural due process and may have violated constitutional prohibitions against excessive fines.

D

THE AWARDS VIOLATED POINDEXTERS' RIGHT TO PETITION FOR GRIEVANCES

A claim made under 42 U.S.C. § 1983 is necessarily against state government defendants. In effect, it is a petition to a court for grievances against the state government and is quite different from a

private action against other individuals who are not governmental employees. This is recognized by the Attorneys' Fee Award Act of 1976 which awards fees to the successful plaintiff as a private attorney general.

Chapter 40 of the Magna Charta provides:

> "We will sell to no man, we will not deny to any man, either justice or right."

The chief purpose was to prohibit the king from selling justice by imposing through his courts fees on litigants. In accordance with this principle, the constitutions of many states provide free access to the courts. For example, Section 5 of Article 1 of the Constitution of Rhode Island (one of the original thirteen colonies) provides:

> "Every person within this State ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely

> and without purchase, completely and without denial; promptly and without delay; conformably to the laws." *Narragnasett Electric Lighting Company v. Sabre*, 50 R.I 288 147 Atl 777 (1929)

The principle of free access to the courts has been part of the various constitutions of Virginia, is called "Right to Petition Government for Redress of Grievances", is presently included in Article 1, Section 12 of the Constitution of Virginia, was taken from the Virginia constitution and included in Amendment 1 of the Constitution of the United States. The constitutional right to petition for grievances includes the right to petition the courts as well as to the legislature. *NAACP v. Button*, 371 U.S. 415 (1965).

As explained in *NAACP v. Button*, *supra*, groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts, and that under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grie-

vances. Dr. Poindexter, as a retired professor of economics and goverment, may file suits *pro se* under 42 U.S.C. § 1983 to change perceived wrongs in government. He does so in good faith. He is the type of citizen who keeps government officials lawful. Legal fees to oppose him are borne by the taxpayers generally who are being protected and are not a particular burden to a particular individual. He believes his sign-purveying vehicle delivered a needed message and the defendants used a bogus process to avoid him giving the message. Now the trial court impoverishes him in order to assure he and others will never petition for grievances again.

Rule 11 when applied to 42 U.S.C. § 1983 and attorneys' fees awarded defendants under 42 U.S.C. § 1988 violate the constitutional right to petition

government for grievances when the defendants are governmental agencies or officials of governmental agencies or attorneys for governmental agencies.

E
CONCLUSIONS ABOUT SANCTIONS AND AWARDS OF ATTORNEYS' FEES

The award of sanctions and attorneys' fees against the Poindexters under Rule 11 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988 was improper because their claim was not factually vindictive and their claim was colorable with arguable merit. If the claim was tortious by being frivolous, they were entitled to right of trial by jury. If the sanctions and fees were imposed as an inherent power of the trial court to control its processes, they far exceeded the offense and were made without due process of law. It obviously has a chilling effect on litigants to petition government for redress of grievances if they are sanctioned for the

effort. Consequently even if the Court should deny a reversal under due process issue and the free speech issue, these awards should be vacated.

IX. CONCLUSION

By its order on July 15, 1988 denying the petition by the Poindexters' for rehearing of its adverse judgment on June 9, 1988, the United States Court of Appeals for the Fourth Circuit decided important issues of federal law contrary to the decisions of this Court and in a manner imposing rank injustice on the Petitioners. Accordingly a writ of certiorari should be granted to review said decision, answer these important questions of federal law and render justice to the Petitioners.

Respectfully submitted,

J. CARL POINDEXTER and
JOSEPHINE T. POINDEXTER

By _____
Their Counsel

John H. Kennett, Jr.
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Counsel for Petitioners

X. PROOF OF FILING AND SERVICES

I, John H. Kennett, Jr., counsel for the Petitioners and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 13th day of October, 1988, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage thereon prepaid addressed to: Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast, Washington, D.C. 20543; and I also served a true copy of the foregoing petition on the Respondents by mailing three copies of same in respective duly addressed envelopes by first class mail with postage thereon prepaid to the following counsel of record:

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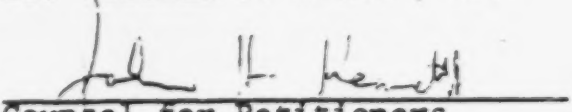

Counsel for Petitioners

STATE OF VIRGINIA,
CITY OF ROANOKE, TO-WIT:

The foregoing proof of filing and services was subscribed and sworn to before me by John H. Kennett, Jr., this 13th day of October, 1988.

My commission expires: Sept 18, 1992

Notary Public

XI. APPENDIX

The attached appendix has its own table of contents.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1188
No. 87-1203

J. Carl Poindexter et al,

Plaintiffs-Appellants

v.

Town of Rocky Mount et al,

Defendants-Appellees

On Petition for Rehearing

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse, with the concurrence of Chief Judge Winter and Judge Hall.

For the Court

s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1188

J. CARL POINDEXTER;
JOSEPHINE POINDEXTER

Plaintiffs-
Appellants

v.

TOWN OF ROCKY MOUNT, VIRGINIA;
ALLEN O. WOODY, JR., Mayor of
the Town; DAVID A. FURROW,
Attorney of the Town; DAVID A.
MELESCO, Attorney of the Town;
WILLIAM J. WALKER, JR., Clerk
of the Circuit Court of
Franklin County

Defendants-
Appellees

No. 87-1203

J. CARL POINDEXTER;
JOSEPHINE POINDEXTER

Plaintiffs-
Appellants

v.

TOWN OF ROCKY MOUNT, VIRGINIA;
ALLEN O. WOODY, JR., Mayor of
the Town; DAVID A. FURROW,
Attorney of the Town; DAVID A.
MELESCO, Attorney of the Town;
WILLIAM J. WALKER, JR., Clerk
of the Circuit Court of
Franklin County

Defendants-
Appellees

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen M. Williams, United States District Judge (CA-85-1058-R).

Argued: April 6, 1988 Decided: June 9, 1988

Before WINTER, Chief Judge, and HALL and SPROUSE, Circuit Judges.

John H. Kennett, Jr. for Appellants. Daniel S. Brown (Dudley F. Woody, Frank K. Friedman, WOODS, ROGERS & HAZELGROVE; John M. Huddle, Todd W. Holliday, GENTRY, LOCKE, RAKES & MOORE; Giles C. Greer, T. Keister Greer, GREER, GREER & FURROW, Joseph W. Morr, Assistant Commonwealth Attorney on brief) for Appellees

PER CURIAM:

J. Carl Poindexter and Josephine T. Poindexter appeal from the decisions of the district court granting summary judgment to the Town of Rocky Mount, Virginia and four individual defendants[1]

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[1]The individual defendants are Rocky Mount Mayor Allen O. Woody, Jr.; Rocky Mount City Attorney David Melesco;

on the Poindexters' action for damages under 42 U.S.C. § 1983 for alleged violations of their fourteenth amendment due process and first amendment free speech rights. The Poindexters allege the defendants conspired to violate their constitutional rights by levying upon the Poindexters' automobile, which at the time of the levy was festooned with signs bearing political messages. The Poindexters also appeal the district court's imposition, pursuant to Fed. R. Civ. P.11, of a monetary sanction and an award of attorney fees. We affirm

The genesis of this controversy was a utility tax enacted by officials of Franklin County, Virginia wherein Rocky Mount lies. In 1982 the district court

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[1](Cont.) Franklin County Circuit Court Clerk William J. Walker, Jr.; and David A. Furrow, a member of a law firm employed by Rocky Mount in relation to the matter in controversy here.

dismissed an action by the Poindexters and others against the County and the Town of Rocky Mount that challenged the validity of the tax. The district court also awarded attorney fees to the County and to the Town of Rocky Mount. The dismissal and the award of attorney fees was affirmed by this court and certiorari was denied by the United States Supreme Court. Hutcherson v. Board of Supervisors of Franklin County, 742 F.2d 142, 146 (4th Cir. 1984), cert. denied, 470 U.S. 1004 (1985).

The law firm of Greer & Greer represented the Town of Rocky Mount in the Hutcherson case and was employed by the Town to collect the $3,512.50 in attorney fees that had been awarded to it in that litigation. After the judgment went unsatisfied for several months, defendant David A. Furrow, an attorney with Greer & Greer, obtained an abstract of the judgment for attorney fees from the United States

District Court clerk. Furrow proceeded to record the judgment in the office of the Clerk of the Circuit Court of Franklin County on November 18, 1985.

On his way to the Circuit Court Clerk's Office, Furrow observed Carl Poindexter behind the wheel of a station wagon owned by the Poindexters. Numerous placards attached to the automobile urged the ouster of County officials and called for a boycott of Rocky Mount businesses. After observing Poindexter in the station wagon, Furrow hastened to docket the federal attorney fees judgment in defendant Circuit Court Clerk Walker's office, obtained a writ of execution, and secured a deputy sheriff to assist him in levying on the Poindexters' station wagon. Furrow and the deputy sheriff located the Poindexters' station wagon parked in front of the office of defendant

David Melesco, the Rocky Mount Town Attorney. Melesco happened to be departing his office when the attempted levy commenced. Defendant Allen Woody, Rocky Mount's Mayor, also came upon the ongoing levy at the Poindexters' car.

The deputy approached Mr. Poindexter and explained that he was about to levy on his vehicle. The deputy refrained from levying, however, when Poindexter offered to give a personal check for the full amount of the attorney fee judgment. Furrow agreed to accept the check and the levy of the station wagon did not occur. Poindexter does not dispute that he was delayed for less than ten minutes, that he kept possession of his vehicle at all times, and that the signs remained visible to the public throughout the confrontation.

1.

In this current action the

Poindexters contend that the defendants violated their due process rights primarily because the issuance of the state writ of fieri facias was improperly grounded on a federal district court judgment. The district court ruled, however, that the detention of the station wagon for the levy did not support a section 1983 action because the State of Virginia provides an adequate remedy for any deprivation of property rights that might have occurred. Parrat v. Taylor, 451 U.S. 527, 542 (1981). Finding no merit to the Poindexter's contentions that no such adequate state remedy exists[2], we affirm that decision of the

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[2] See generally Fox v. Deese, 362 S.E.2d 699, 706 (Va. 1987) (municipal officials have no sovereign immunity for intentional torts); Barbuto v. Southern Bank, 340 S.E.2d 813, 816 (Va. 1986) (writ of fieri facias issued negligently or fraudulently is subject to a motion to quash under Va. Code §8.01-477); First Virginia Bank -Colonial v. Baker, 301 S.E. 2d 8, 11 (Va. 1983) (clerk of county circuit

district court.

We also affirm the district court's grant of summary judgment to the defendants on the Poindexters' first amendment claim. The Poindexters' speculative and unsupported allegations of a conspiracy fail to counter the detailed affidavits presented by the defendants. See Bushi v. Kirven 755 F.2d 1240, 1248 (4th Cir. 1985); Int'l Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1271 (4th Cir. 1981).

The district court's summary judgment was correct, moreover, for the even more fundamental reason that no violation of the Poindexter's first amendment rights is apparent from their allegations. The Poindexters' vehicle was delayed for less than

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[2](Cont.) court liable on bond for deputy's misfeasance); Va. Elec. & Power Co. v. Hampton Redevel. & Housing Auth., 225 S.E. 2d 364, 368 (Va. 1976) (municipality may lack immunity for non governmental functions).

ten minutes. The writ of fieri facias was never executed. No reference to the political signs was made at that or any other time, and they continued to be displayed on the station wagon before, during and after the deputy's discussion with Poindexter and the satisfaction of the judgment by the giving of Poindexter's personal check.

11.

During the pendency of the present action, Carl Poindexter moved the court in September 1986 "to grant relief from the court's judgment against us. . . for the attorney fees of the governmental defendants" in the original Hutcherson case. Attached to his motion was a brief generally attacking the basis for imposition of the attorney fees in that prior case. Five days later the district court, noting that the issue was

res judicata, imposed rule 11[3] sanctions against Carl Poindexter in the sum of $5,000.00 "for filing a purely frivolous motion in this case." The court ordered Poindexter's payment to be held by the Court pending the disposition of the case.

At the conclusion of the litigation we now review, the district court granted attorney fees to the defendants

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[3] Fed. R. Civ. P. 11 provides in part that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction...."

totaling $11,202.07 and credited the $5,000.00 sanction against Mr. Poindexter to the fee award. The court noted that the plaintiffs never alleged evidence even arguably subjecting any of the defendants to liability under section 1983. It concluded "that the entire proceeding in this case was vindictive, frivolous and vicious and was brought by spite held against the defendants."

The imposition of sanctions under rule 11 is committed to the sound discretion of the trial court, Basch v. Westinghouse Elec. Corp. 777 F.2d 165, 174 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), and we perceive no abuse of that discretion when the court ordered that Mr. Poindexter pay a $5,000 penalty. Likewise, the court has broad discretion in awarding attorney fees to defendants

on the basis that claims against them are "frivolous, unreasonable or groundless." Bernstein by Bernstein v. Menard, 728 F.2d 252, 254 (4th Cir. 1984). The award of attorney fees in this case was based on detailed submissions in accord with the procedures outlined in Barber v. Kimbrell's, Inc. 577 F.2d 216, 266 & n.28 (4th Cir), cert. denied, 439 U.S. 934 (1978) and the Poindexters did not object to the amount of time claimed nor to the amount charged. They contend rather that any award is improper because their suit was filed in good faith. Since we do not believe the district court abused its discretion in determining otherwise, we affirm its award of attorney fees.

The judgments of the district court therefore are affirmed in their entirety.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

J. CARL POINDEXTER, Plaintiff v. TOWN OF ROCKY MOUNT, VIRGINIA, et al, Defendants	CIVIL ACTION NO. 85-1058R MEMORANDUM OPINION

By: Hon. Glen M. Williams
United States District
Judge

J. Carl Poindexter, plaintiff, brought this suit under Civil Rights Act, 42 U.S.C. § 1983 for violations of his First, Tenth and Fourteenth Amendment Rights. Plaintiff alleges that defendants maliciously, intentionally and for purposes of retaliation levied on his family station-wagon to satisfy a judgment entered against him. Defendants have made a motion to dismiss for failure to state a claim upon which relief could be granted, and also for insufficient service of process. Upon review of the record, the court is of the opinion that this claim should be

dismissed.

Plaintiff's claim essentially involves deprivation of property by town and county officials. Plaintiff was one of seventeen people who had earlier challenged a certain tax statute. That suit was dismissed as being frivolous and plaintiffs were ordered to pay defendants' attorneys fees. Hutcherson v. Board of Supervisors, No. 82-0377-R (July 27, 1982 W. D. Va.) (UP). Plaintiff alleges that defendants maliciously, recklessly and illegally enforced collection of this judgment by securing a writ of fieri facias to levy on his stationwagon. Plaintiff contends this was done solely in retaliation to plaintiff's exercise of his first amendment right to free speech. Plaintiff was driving around the town with signs on his stationwagon inter alia, urging the boycott of town

business. Plaintiff contends that he had other funds and property which could have been levied on to satisfy the judgment, and therefore, defendants' actions clearly violated his right to due process and free speech. Plaintiff also maintains that because the writ of fieri facias was not issued by a federal court nor served by U.S. Marshals that is was per se illegal.

In order to state a claim for relief under § 1983, it must be clear that two essential elements are present: (1) conduct committed by a person acting under color of state law; and (2) deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527 (1981). The first element is clearly satisfied in the case sub judice. However, the conduct complained of does not amount to a constitutionally significant deprivation. Where a state porvides adequate means by

which one can seek redress for violation of his rights to property, the requirements of due process are satisfied. Parratt, Id. Plaintiff's claim falls squarely within the meaning of Parratt as far as his challenge of unauthorized failure of defendants to follow proper procedure. There are means to challenge the defendants' actions under state laws and procedures. Va. Code § 8.01-195.1 et seq. 1984).

The Supreme Court recently partially overruled and expanded Parratt in Daniels v. Williams, _____ U.S. ____, 54 U.S.L.W. 4090 (Jan. 21, 1986) to hold that mere lack of due care or negligence by a state official has no constitutional significance. The issue of whether something more than mere negligence was enough to trigger the protections of the Due Process clause was not addressed. The Court, however, continues to recognize that state tort claims statutes

provide adequate redress for negligence actions against state officials. Construing plaintiff's claim in a light most favorable to him, and assuming that there was a deprivation of property, the court finds that Virginia provides adequate post-deprivation remedies. Whether the acts committed by defendants are characterized as discretionary or ministerial in nature, it appears that the "deprivation" of plaintiff's property was not without due process of law. Plaintiff acknowledges both the fact of the judgment and the writ of fieri facias. The court can find no constitutional significance in the acts of defendants according to the reasoning in Parratt and Daniels.

Accordingly, defendants' motion to dismiss shall be granted in an Order entered this day.

ENTER: This 3 day of June, 1986.

s/Glen M. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

J. CARL POINDEXTER AND JOSEPHINE T. POINDEXTER, Plaintiffs	:	
v.	:	Civil Action No. 85-1058-R
TOWN OF ROCKY MOUNT, ALLEN O. WOODY, JR., DAVID A. FURROW, DAVID A. MELESCO, WILLIAM J. WALKER, Defendants	:	O R D E R
	:	By: Hon. Glen M. Williams, United States District Judge

By Order entered June 17, 1986, this action was reinstated on the docket for the purpose of further considering plaintiffs' First Amendment claim. Plaintiffs essentially allege that defendants violated their first amendment right to free speech by causing a writ of fieri facias to be executed against plaintiffs' station wagon on the day that plaintiff, J. Carl Poindexter, was driving the vehicle around the town with certain signs and messages displayed on the vehicle. Plaintiffs allege that defendants maliciously and recklessly conspired and

vindictively carried out their conspiracy with the intent to suppress the exercise of their right to free speech.

The action is presently before the court on renewed motions to dismiss and motions for summary judgment. Defendants have submitted affidavits in support of their motions.

Upon review of the record, the court is of the opinion that plaintiffs' claims against the Town of Rocky Mount and David A. Melesco fail as a matter of law. Plaintiffs have failed to state a claim against defendant Melesco. Nowhere in the complaint is Melesco mentioned other than in the style of the case. Instead, plaintiffs refer to defendants collectively and allege that "they continue to have me flagged down" and that "all of the above-named town defendants had ganged around my station wagon and me". The only defendants specifically named

in the complaint were David A. Melesco and Allen O. Woody, Jr.

Melesco is currently the town attorney for Rocky Mount. Melesco maintains that he was not involved with the earlier suit from which the judgment against Poindexter and others arose, and that he did not participate in subsequent decisions concerning the collection or attempted collection of attorney's fees. J. Carl Poindexter, plaintiff, in his affidavit filed July 14, 1986, states that the particular town officials named as defendants should be held liable on grounds that they are chargeable with constructive knowledge of, participation in and responsibility for the conspiracy to confiscate his and his wife's"speech-purveying" property.

In a summary judgment decision where the movant has submitted affidavits demonstrating the absence of any genuine issue of material fact, the nonmovant must

produce some evidence to create fair doubt; wholly speculative assertions will not suffice. Ross v. Communications Satellite Corp. 759 F.2d 355, 364 (4th Cir. 1985). Plaintiffs' allegation concerning defendant Melesco's involvement in levying on the station wagon, do not arise above the level of mere speculation. Absent plaintiff's bold allegations that the town defendants conspired to violate his first amendment rights, there is no allegation that defendant, Melesco, participated in this venture. Apparently, Melesco was named as a defendant because he is currently serving as the town attorney. There is simply a lack of evidence from which the court could draw the inference that Melesco participated in the alleged conspiracy. The Court, therefore, finds that plaintiffs have failed to state a claim against defendant Melesco, and that Melesco is entitled to summary judgment.

In order to state a cognizable claim against a municipality under 42 U.S.C. § 1983, plaintiff must show that he has been deprived of his rights by a person acting under color of state law, policy or custom. The term person has been construed to include local governing bodies and local officials. See Monell v. Department of Social Services, 436 U.S. 658 (1978). In Monell, the Supreme Court held that local governments could be sued for constitutional deprivations visited pursuant to governmental "custom, even though such custom has not received formal approval." Id. at 690-691. More recently the Supreme Court has found that a municipality may be held liable under § 1983 only for deprivations caused by unconstitutional official policies or customs. Polk County v. Dodson, 454 U.S. 312, 325 (1981). The Court stated that

the initial inquiry is into the existence of a policy. See also Paxman v. Campbell, 612 F.2d 848, 856-859 (4th Cir. 1980). "When an official has final authority in a matter involving selection of goals, his choices represent policy." Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983). When a municipal official is responsible for the choice and implementation of practices and procedures, his acts and omissions reflect government policy, and municipal liability will attach to acts performed pursuant to that policy. Id.

Plaintiffs seek to hold the Town of Rocky Mount liable under § 1983 for the alleged deprivation of their first amendment rights. Although plaintiffs have named the mayor, town attorney and clerk of court as participants in the alleged conspiracy, the pleadings are void of any indication that the defendants were acting pursuant to

an official policy, custom or procedure attendant to their respective duties as municipal and county officials.

The record shows that the collection activities concerning the costs assessed Mr. Poindexter and the other litigants in Hutcherson v. Board of Supervisors of Franklin County and Town of Rocky Mount, Civil Action No. 82-0377-R (Nov. 3, 1982) had been assigned to the law firm of Greer & Greer by Mayor Woody on behalf of the town. It has been determined that the firm would make initial collection efforts against Mr. Poindexter. The manner in which the judgment was to be collected was, however, within the discretion of Greer & Greer. (Affidavits of David A. Furrow and Allen O. Woody, Jr.).

The Court finds that the decision made by the mayor on behalf of the town to initiate collection activities against Mr. Poindexter was an official act; as was the

decision to authorize the law firm to proceed with collection activities. However, by no means can these decisions be construed to be unconstitutional acts in themselves. Whatever acts may have occurred subsequently has no bearing on the constitutionality of the initial decisions to turn over the collection proceedings to the law firm and against whom to proceed. Based on the foregoing, the court finds no basis for imposing liability under § 1983 upon the Town of Rocky Mount for acts committed by others which allegedly violated plaintiffs' first amendment rights. Therefore, summary judgment shall be granted in favor of the Town of Rocky Mount as a matter of law.

An order shall be entered this day granting summary judgment in favor of defendant Melesco and the Town of Rocky Mount.

Enter: This 31 day of October, 1986

s/ Glen M. Williams
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

J. CARL POINDEXTER et al, Plaintiffs	:	
v.	:	CIVIL ACTION NO. 85-1058-R
TOWN OF ROCKY MOUNT et al, Defendants	:	MEMORANDUM OPINION

Pursuant to 42 U.S.C. § 1983, plaintiffs filed suit contending that the defendants violated their First Amendment rights by levying on their motor vehicle which bore signs protesting some of the defendants' actions. The court has previously granted summary judgment to some of the defendants and the case is now before the court on motions for summary judgment filed on behalf of the remaining defendants. The court has given notice to the plaintiffs to respond to the motions for summary judgment and the evidence presented by the defendants in support of those motions. The plaintiffs have now filed affidavits in opposition

to the motion for summary judgment.

This case is now ripe for ruling on the motion. In a case such as this, the court must determine whether the evidence presents a sufficient disagreement to require submission of the case to the jury, or whether it is so one-sided that the defendants must prevail as a matter of law. No such issue exists where the non-moving parties do not have sufficient evidence favoring them for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 54 U.S.L.W. 4755 (1986).

The evidence disclosed that in a prior law suit filed in this court, Hutcherson v. Board of Supervisors, Civil Action 82-0377-R (W.D. Va. January 20, 1983), Carl Poindexter was one of seventeen plaintiffs against whom the Board of Supervisors of Franklin County and the Town of Rocky Mount, Virginia obtained a judgment in the amount of

$3,512.50 for attorney's fees. This case has been appealed to the United States Court of Appeals for the Fourth Circuit and to the United States Supreme Court and final judgment had been granted on behalf of the Board of Supervisors of Franklin County and the Town of Rocky Mount, Virginia. In September 1984, while David A. Melesco was an attorney for the Town of Rocky Mount, Virginia, Allen O. Woody, Jr., Mayor of the Town of Rocky Mount, employed the law firm of Greer and Greer to collect the Town's judgment. The manner of collecting the judgment was left to the firm's discretion.

Greer and Greer assigned the task of collecting the judgment to David A. Furrow, one of the firm's attorneys. In an affidavit, Mr. Furrow describes the facts surrounding the levy. On November 18, 1985, he obtained an abstract of the judgment from the Clerk of the United States District Court for the Western

District of Virginia. When Mr. Furrow went to the Clerk's Office of the Circuit Court of Franklin County, Virginia to docket the judgment, he saw a station wagon being driven by the plaintiff J. Carl Poindexter. He decided that as soon as he had the judgment docketed, he would proceed to levy on the station wagon in an expeditious manner. While the Clerk was docketing the judgment, he went to the Sheriff's Office and asked that a deputy meet him at the Clerk's Office. After the Deputy Clerk had typed up a writ of fieri facias, Deputy Sheriff Russell Dyer of the Franklin County Sheriff's Department came to the Clerk's Office and went with Mr. Furrow to find the station wagon.

Mr. Furrow and the Deputy Sheriff walked out of the Court House and saw the station wagon proceeding down Court Street. They got into a police cruiser to pursue the station wagon when it pulled into Maple

Avenue, proceeding towards the United Virginia Bank. As the station wagon approached the law offices of David A. Melesco, it had to stop because of construction. Deputy Dyer then left the cruiser, approached the station wagon and, upon ascertaining that it was being driven by J. Carl Poindexter, informed Mr. Poindexter that he was levying on the automobile. Deputy Sheriff Dyer told Mr. Poindexter that Mr. Furrow would post bond for the automobile in order to have it taken into possession. Mr. Poindexter then proceeded to pay the judgment. In an affidavit, Mr. Furrow further states that the decision to levy upon the vehicle was entirely his own; that he had entire discretion as to how the judgment should be collected; and that he did not do so in any manner in which interfered with anyone's right of freedom of speech.

The other defendants in this suit have also supplied sworn affidavits stating they did nothing to interfere with the Poindexters' right of freedom of speech. David A. Melesco, the Town Attorney, states that he had not been employed in the prior proceeding and he had nothing whatsoever to do with the levying on the automobile. At the time of the levy, he was not the Town's attorney and the fact that the levy occurred near his office is only an incidental matter. Also, the Mayor, Mr. Woody, was in Mr. Melesco's office and came out duirng the time that the station wagon was being levied on. The defendant, William J. Walker, Jr., is the Clerk of the Circuit Court of Franklin County, Virginia and the only actions taken by him in this case were to docket the judgment obtained in federal court and to have the deputy clerk to issue a writ of

fieri facias directed to a deputy sheriff to collect the judgment.

This court has heretofore permitted Josephine T. Poindexter to intervene in this suit as a plaintiff and she has filed an affidavit in which she states that she had an interest in the station wagon, since it was titled in her name and that of J. Carl Poindexter, her husband. She alleges that she is advised that there was no legal authority for the Clerk of the Circuit Court of Franklin County to issue process to collect the judgment by federal court, that the process was void and that he seizure was invalid. She concludes that the vehicle was seized to prevent her and her husband from exercising their free speech rights by displaying signs on the motor vehicle. She had not placed the signs on the vehicle but they had been placed there by her

husband. She concludes her affidavit by stating "This seizure of the vehicle without any lawful process abridged the right of free speech." J. Carl Poindexter has also filed an affidavit in this case essentially along the lines of those filed by his wife. He states that he owned other property which could have been levied on, including a bank account and that the sole purpose of levying on the jointly owned station wagon was to prevent his exercise of free speech.

In a case such as this where plaintiffs are alleging a violation of their First Amendment rights, the initial burden is on plaintiffs to show that their conduct was constitutionally protected, and that this conduct was a substantial or motivating factor in the levying on the motor vehicle. If plaintiffs satisfy this test, the burden

then shifts to the defendants to show by a preponderance of the evidence that they would have taken the same actions in the absence of such protected conduct. Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

The Clerk of this court, William J. Walker, has no liability in this case. His only involvement is that his office issued the writ of fieri facias; he neither personally issued the writ nor knew it had been issued. Since the doctrine of respondeat superior does not apply in § 1983, Mr. Walker is not responsible for the acts of his deputies. See Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977).

The plaintiffs have not made any allegations or provided any evidence that levying upon a station wagon,

personal property under Virginia law, is improper. In Virginia, a judgment creditor may seek to satisfy the judgment against any of debtor's non-exempt goods and chattels. Va. Code § 8.01-478 (1984). The station wagon is personal property in Virginia. Once the writ issues, the Sheriff's office is the agent of the judgment creditor. The creditor determines whether a levy should occur and controls the levy's execution. Roe v. Hardy, 97 Va. 674, 34 S.E. 625 (1899). Since the Deputy Sheriff decided the levy was proper, only he and the person directing him would have any responsibility. The Deputy Sheriff is not a defendant in this case.

The evidence in this case shows without dispute that the purpose of the defendants was to collect a judgment and not to interfere with any free speech

rights of either one of the plaintiffs. When the plaintiff offered to pay off the judgment, the same was done. Consequently, the levy was never completed and the vehicle was not seized. There is no evidence that any of the defendants interfered with the free speech rights of the plaintiffs. Accordingly, this court finds that there is no factual issue to present to the jury upon which a verdict could be based showing that this lawful levy was made for the purpose of interferring with the free speech rights of the plaintiffs. The Court will enter an Order granting summary judgment to all of the remaining defendants in this case who have not heretofore been granted summary judgment.

In an earlier Order, this court rendered sanctions against the plaintiffs in the sum of $5,000 which has been paid into court. The Court has also ordered

the defendants who have previously been awarded judgment to withhold filing any petition for attorney's fees pending the completion of this case. Without ruling on the manner in which the $5,000 in sanctions shall be paid out, the court hereby directs the defendants, if they desire to do so, to file petitions for attorney's fees within ten (10) days after which time, the court will determine whether or not attorney's fees will be awarded in this case and whether or not the same will be paid out of the $5,000 now being held by the court.

ENTER: This 22 day of September, 1987.

s/ Glen M. William
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

J. CARL POINDEXTER et al,	:	
	:	
Plaintiffs	:	
	:	CIVIL ACTION
v.	:	NO. 85-1058-R
	:	
TOWN OF ROCKY MOUNT et al,	:	
	:	MEMORANDUM
Defendants	:	
		OPINION

This case is before the court on the petitions of the various defendants in this case for an award of attorneys' fees against the plaintiffs. In order for the court to rule on the issue of whether or not the plaintiffs' suit was frivolous, it is necessary for the court to review this lawsuit from its inception.

By way of background, J. Carl Poindexter, in the complaint filed in this case, sets forth that he was one of seventeen plaintiffs who brought suit against the Board of Supervisors of Franklin County, Virginia and the Town of Rocky Mount, Virginia, challenging the constitutionality of Section

56.617.2 of the Code of Virginia. This suit was originally styled Ophus A. Hutcherson, Jr. v. Board of Supervisors of Franklin County et al (W.D. Va. CA # 82-0377-R). This case was presided over by the Honorable Jackson L. Kiser who entered an Order on November 3, 1982 dismissing the case on the grounds of lack of jurisdiction and further ruling that the suit was frivolous. J. Carl Poindexter was an instigator of this lawsuit and the case was ultimately appealed, according to the pleadings in this case, to the Supreme Court of the United States. Judge Kiser's decision was upheld. Judge Kiser awarded attorneys' fees to the defendants in the case. The award of attorneys' fees in the sum of $5,511.25 was appealed to the United States Court of Appeals for the Fourth Circuit and ultimately to the United States Supreme Court which upheld the award of attorneys' fees and thus, held that the

suit was frivolous. The Town of Rocky Mount was awarded $3,512.50 for its attorney's fees and the efforts to collect this judgment resulted in the current lawsuit.

While this court was attempting to rule on the various motions to dismiss and summary judgment pending before the court, plaintiff J. Carl Poindexter filed a motion on September 17, 1986 in which he asked that W. H. Hausman be made a party to this suit and further moved the court to grant relief from judgment in the Hutcherson case awarding attorneys' fees to the Town of Rocky Mount and the Franklin County Board of Supervisors. Thus, Poindexter asked the court to overrule the Supreme Court of the United States and to begin relitigating various issues which were res judicata. Poindexter is no stranger to the courts, being a pro se

litigator of some experience. He is also a man of considerable intelligence, being a retired college professor. One can ascertain from the pleadings in this case that he is an astute individual and this court is of the opinion that he has absolute knowledge of the doctrine of res judicata. The actions of Poindexter were so vindictive in this case that he had absolutely no regard for the fact that the Town of Rocky Mount, Mayor Woody of the Town of Rocky Mount, Melesco, Walker and Furrow had each employed counsel in this case who were responsible for filing pleadings on their behalf. This court, recognizing the viciousness of the motion and in an effort to relieve the defendants from having to respond, acted as quickly as it received notice of the motion of Poindexter and overruled and dismissed this motion and entered sanctions in the sum of

$5,000 against Poindexter as a warning to him not to pursue matter which had already been litigated. It matters not whether an insurance company was furnishing the attorney, or the Town was furnishing the attorney, or the State was furnishing the attorney, or the individual was furnishing his own attorney; the actions of Poindexter caused each of the defendants in this case to be liable for additional attorney's fees. This court entered its Order on September 22, 1986; however, counsel for Melesco filed a response on September 22, 1986, the same date of the court's Order; Allen O. Woody, Jr. and the Town of Rocky Mount filed a motion on September 22, 1986. The plaintiff appealed this Order to the United States Court of Appeals for the Fourth Circuit which this court has already filed was a frivolous appeal since the Fourth Circuit

Court of Appeals did not and could not hear this case since there was no final order. Nevertheless, the defendants had to endure and be responsible for attorneys' fees for following up on this frivolous appeal.

Now that the court has concluded this case by finding in favor of each of the defendants and the court now addresses the issues of this case as to whether or not the entire suit was frivolous. First of all, the court would note that as to the Town of Rocky Mount and Melesco, there was not in the complaint nor has there ever been any evidence presented to this court that the plaintiff had any justification for suing them initially. The Town of Rocky Mount could only be liable if it had a policy which caused the actions against the plaintiff in levying on his automobile. No policy has been shown and none has been alleged. Further-

more, the plaintiff was never possessed of any evidence that Melesco had anything to do with the entire affair. The evidence shows that the defendant William J. Walker, Clerk of the Circuit Court of Franklin County, Virginia, in his official position, would have been subject to mandamus had he not issued the execution of the judgment in this case. Furthermore, the plaintiffs were not possessed of any evidence whatsoever that David A. Furrow did anything other than what an attorney would do to collect a debt. This court must conclude taht the entire proceeding in this case was vindictive, frivolous and vicious and was brought by spite held against the defendants. This is the typical case in which attorneys' fees should be awarded against a plaintiff in a civil rights case because there was no basis for it whatsoever.

According to the court's information, at the time Poindexter appealed this case to the United States Court of Appeals, he posted certain stock that he owned as bond for the $5,000 in sanctions. The court is not advised at this time as to the value of this stock but it is hereby ORDERED that the court shall continue to hold this stock until such time as it can be cashed and used to reimburse and satisfy the attorneys' fees in this case.

Petition for attorneys' fees have been filed by Dudley Woody, who represented Melesco; Daniel S. Brown of the firm of Woods, Rogers & Hazlegrove, who represented Mayor Woody and the Town of Rocky Mount, Virginia: Joseph Mott, who represented Walker; T. Keister Greer, who represented David A. Furrow; and G. Carter Greer, who represented David A. Furrow. John M. Huddle is shown as

having represented Walker in a portion of this case at least, but he has not filed any petition for attorneys' fees. The respective attorneys in this case have filed affidavits before the court setting forth the amount of time spent on this case; the novelty and difficulty of the case; the degree of skill required; their customary fee for trial work; and their expectation of a fee; the time spent on the case and the seriousness of the case; the experience and ability of the attorney; and attorney fee awards in similar cases, as well as additional information. No opposition has been presented as to the amount requested for attorneys fees. The Court has examined all of the respective petitions for attorneys' fees and finds that they are reasonable. Accordingly, the court awards to Dudley Woody, Esquire, $719.57 for fees and expenses in representing

Melesco; To Daniel S. Brown, Esquire, for representing Mayor Woody and the Town of Rocky Mount, $8,412.50, which represents his expenses and those of other attorneys in his firm; to John Mott, Esquire, for representing Walker, $600.00; to T. Keister Greer, Esquire for representing David A. Furrow, $300.00; and to G. Carter Greer, Esquire, for representing David A. Furrow, $1,170, making a total of $11,202.07. Judgment is hereby granted to the defendants against the plaintiffs J. Carl Poindexter and Josephine T. Poindexter in the total of $11,202.07, for which execution shall issue; and an Order will be entered to this effect. An Order will be entered directing the Clerk of this court to ascertain the value of the stock being held which shall be credited to the judg-. ment in a pro rata amount to each of the

attorneys entitled thereto.

ENTER: This 17 day of November, 1987.

s/Glen M. Williams
U.S. District Judge

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS CITED IN PART V1 OF THIS PETITION

(1) Constitution of the United States

Amendment 1, which in pertinent part is as follows:

> "Congress shall make no law ...abridging the freedom of speech, or ... the right of the people ... to petition the government for redress of grievances.

Amendment V11 which in pertinent part is as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...."

Amendment V111 which in pertinent part is as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, ..."

Amendment X1V, Section 1

> "...nor shall any State deprive any person of... property, without due process of law; ...."

(2) United States Code

42 U.S.C. § 1983 which in pertinent part is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to a deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1988 which in pertinent part is as follows:

"In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost".

(3) Federal Rules of Civil Procedure

Rule 11 which in pertinent part is as follows:

"Every pleading, motion, or other paper of any party represented by an attorney shall be signed at least by one attorney of record... . A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.... The signature of an attorney or party con-

stitutes a certificate by him that he has read the pleading, motion, or other papers; and that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, ... If a pleading, motion, or other paper is signed in violation of this rule, the court, ... shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Rule 69(a) which in pertinent is as follows:

"Process to enforce a judgment for the payment of money shall be by writ of execution, unless the court directs otherwise."

(4) Code of Virginia of 1950 as amended

Va. Code § 8.01-447 which is as follows:

"Judgments and decrees rendered in the circuit court of appeals or a district court of the United States within the Commonwealth may be docketed and indexed in the clerks' office of courts of the Commonwealth in the same manner and under the same rules and requirements of law as judgments and decrees of the courts of the Commonwealth."

Va. Code § 8.01-466 which in pertinent part is as follows:

"On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was rendered, upon the request of the judgment creditor, his assignee or his attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of entry of the judgment and place the same in the hands of the proper officer of such court to be executed and take his receipt therefore."